

USAWC STRATEGY RESEARCH PROJECT

JUST WAR AND PREEMPTION  
STRATEGIC LEGITIMACIES

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## ABSTRACT

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This paper studies the use of preemption and its implications for recent history. The study will show the role of preemption and its place in international law from its standing as a customary law to one that is governed by charters and treaties.

Through the use of definitions and historical examples, both legitimate and illegitimate acts will be examined. The paper will initially focus on background information regarding international law and will then move into discussions of the Cuban Missile Crises, the 1967 Arab-Israeli War and the Osirak Nuclear Facility Raid. These events lead to a discussion on our current involvement with Iraq. An examination of the strategic implications of our actions both leading up to and subsequent to the invasion of Iraq will be undertaken and the opinions of some of our allies and scholars will be considered. The possible consequences of the actions of the United States will also be addressed. The discussion of these consequences will focus mainly on the perceptions of the United States by both allies and non-allies and how those perceptions will guide nations in the future.

While this treatise does not pretend to offer answers or a panacea for solving all these issues, it will enhance our understanding of the United States as the only superpower able to provide leadership and guidance to the global community. The actions of the United States will shape the way the world understands and applies preemptive war in the years to come.



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## JUST WAR AND PREEMPTION

Just or unjust, preemptive or preventative, are these acceptable forms of military action as we move into the 21<sup>st</sup> century? With the advent of weapons of mass destruction (WMD) that are easy to procure, manufacture, and deploy, the ability and justification to strike first has become more solid. This paper, through the use of definitions, historical examples, and a review of international law, will argue that a preemptive or anticipatory attack is in some instances justifiable and, as such, a justified first strike has now become a part of the President's National Security Strategy. This paper will also examine the Bush administration's use of preemption as it pertains to the United State's current involvement in Iraq. In addition, the paper will explore the implications of the administration's policy when it comes to the United State's interaction with some of its European Allies and their concerns in regards to the United States position as the world's only superpower.

### DEFINITIONS

To better understand the preemptive strategy, a foundational understanding is needed.

Michael Walzer, in Just and Unjust Wars, A Moral Argument with Historical Illustrations, abbreviates a just war to two simple principles: 1) it must be a defensively motivated last resort and, 2) "it's anticipated costs to soldiers and civilians alike must not be disproportionate to, as in greater than, the value of it's ends."<sup>1</sup>

Preemptive attack, as described by Richard Betts in Surprise Attack, "is designed to seize the initiative upon receipt of strategic warning that the enemy is preparing an attack of his own",<sup>2</sup> and that it "occurs when both parties see war coming, but one jumps the gun in order to gain a military advantage."<sup>3</sup> This action would consist of an attack or a raid. A preemptive war follows the same line as a war entered into on the basis or expectation that an enemy attack is imminent. Betts continues his analysis by looking at a surprise attack against an enemy who is not yet preparing his own attack and that "basic to a decision to engage in preventative war is the prediction that the potential military strength of one's own state is declining in comparison with the military strength of the enemy and that the belief that all other options for averting the threat have been exhausted."<sup>4</sup> Michael Walzer in Just and Unjust Wars, says that "preventative war looks to the past and the future" while preemption may be more tied to the threats of the present.<sup>5</sup>

Preemptive attacks have limited objectives or targets with the elimination of a particular threat as the purpose. A preemptive war is much longer in its duration and is used to impose the will of the attackers upon the attacked. Evidence of an imminent threat is what drives the



state to a preemptive war. Preventative attack and preventative war are initiated to deal with an anticipated threat after other means have been exhausted. Clearly, military action at the international level impacts our understanding of international law.

## **INTERNATIONAL LAW**

International law is formed by states through two different venues. One is a formal path of treaties. These are bilateral and multilateral agreements between states. The Strategic Arms Reduction Treaty between the United States and Russia is an example of a bilateral agreement while the United Nations Charter is a multilateral agreement. The other form of international law, called "customary", comes about through the actions of states. States engage in an activity that they believe is required. Anthony Arend in "International Law and the Preemptive Use of Military Force", uses diplomatic immunity as an example of customary law that eventually became recognized through treaty. Centuries ago states granted diplomats immunity from jurisdiction of the host country. This was done in order to maintain open channels of communication between states.<sup>6</sup> Arend observes that "gradually these states that had originally begun granting immunity for largely practical reasons came to believe that granting immunity was required by law. At that point there was a rule of customary law - when there was both a near-universal practice and a belief that the practice was required by law."<sup>7</sup> Preemptive force as a permissible form of self-defense was initially brought forward under the guise of customary law. Arend identifies two criteria for permissible self-defense which warrants preemptive self-defense: necessity and proportionality.<sup>8</sup>

A country would have to show or express that the need or necessity to exercise force was immediate and there was no other available means to appropriately address the threat. The state engaging in the preemptive strike would then be required to act in a manner proportionate to the impending threat. Prior to the United Nations Charter, Arend states that, "scholars held that these two criteria set the standard for permissible preemptive action. If a state could demonstrate necessity - that another state was about to engage in an armed attack – and act proportionately, preemptive self-defense would be legal".<sup>9</sup>

With the advent of the United Nations and its charter in 1945, the framers were looking to encourage nations to refrain from the threat or use of force. There are two exceptions to that prohibition, however. The first is Article 42 which allows the Security Council to authorize the use of force when there is a threat to peace or an act of aggression. Article 51 references the other exception: self-defense. There are two schools of interpretation for Article 51, the restrictionist and the counter-restrictionist. Restrictionists feel that Article 51 explicitly limits the

rule of self-defense to those actions that occur after an armed attack has actually taken place. They believe that any form of preemption is unlawful. The counter-restrictionists maintain, however that Article 51 was never intended to restrict a states right of preemptive self-defense. They maintain that the framers intended to continue customary law, i.e., the right of anticipatory self-defense. The armed attack example mentioned in Article 51 is only one example of what would allow a nation to act. Anthony Arend proposes, "that the Charter is sufficiently ambiguous on this question and that there was a preexisting rule of customary international law allowing for anticipatory self-defense, it is not necessary to establish that a customary rule has emerged to permit states to use force preemptively in order for such use of force to be lawful. On the contrary, it is necessary rather to establish that there is no rule prohibiting states from using force preemptively".<sup>10</sup> Whereas the authors of Article 51 chose to set a strict standard for the justification of military action even in the case of self-defense, most experts believe Article 51 allows for anticipatory self-defense. Nonetheless, it appears that Article 51 merits reconsideration. Shortly after the attacks of September 2001 the United Nations Security Council issued Resolution 1373 (UNSCR1373). It states that international terrorism is a threat to international peace and authorizes the need to combat terrorism by "all means" in with the United Nations Charter and the right to self-defense.<sup>11</sup> While UNSCR1373 does legitimize preventative measures and grant approval for action by member nations, it does not authorize unilateral or multi-lateral preemptive military action per se. However, if a preemptive war is to be justified in a particular instance it is not to be looked upon necessarily as a question of international law. The question that needs to be addressed is: Is an aggressive preemptive act an instance of legitimate self defense? There are criteria for examining the action that stems from an even more elementary position in the realm of international politics as opposed to the written law. These criteria are those tacit unwritten "understood" that are dealt with by states or the peripheral rules of what is or is not within the bounds of explicit rules. Whereas these "understood" may change as circumstances evolve, a general consensus has developed as to what those criteria are.

In order to justify a preemptive war the initiating state needs to show or have evidence that the action taken was necessary and that the action prevented a greater harm from being perpetrated on itself. The state that initiates preemptive war needs to show that the threat necessitating preemption was so well defined and imminent that immediate action was warranted. The threat could be so direct or blatant that the state would be justified in attacking. It also could be a threat that is critical, as it looks to have direct negative impact on the vital interests of the threatened state. Moreover, the threat could be something that is

unmanageable by conventional means as in negotiations through diplomatic channels. These criteria, of course, are open to review and examination, however, they are representative of historical examples or experiences that have played out in the international arena. These criteria have been used by the international community both in claims and arguments in regards to preemptive wars. These criteria however are sufficiently restraining to cause most preemptive attacks to be considered illegal, but not so restrictive that they preclude preemptive war from being justified.

There is little argument that Article 51 effectively rules out preventative war. President G. W. Bush has stated that preemption and prevention will be utilized by the United States during its conduct of the Global War on Terror.<sup>12</sup> When the United States initiated its preemptive military action against Iraq, it did so by pushing the edges of Article 51.

We will explore three different historical examples of preemption. Those we will look at will be the planned use of preemption, the use of what would be considered justifiable preemption, and what would be condemned as an act of illegal preemption. Following review of these examples, this paper will examine the current U.S. involvement in Iraq.

## **HISTORICAL EXAMPLES**

While there are many examples of preemptive use of military force, there are three from recent history that can be used to look at preemption from three different perspectives. The 1962 Cuban Missile Crisis is one where a preemptive attack could have been easily justifiable, but was not used. A diplomatic approach ultimately brought closure to the issue. Israel's 1967 Six Day War illustrates an instance where attack met accepted criteria to justify the action. Israeli attack on the Iraqi nuclear reactor at Osirak provides a third example of an action where one state felt justified in preemptive attack. Others, however, saw it as an act of aggression without warrant.

### **CUBAN MISSILE CRISIS**

The history of the Cuban Missile Crisis is well documented. On October 14, 1962, photographs taken by a U-2 spy plane contained evidence showing that the Soviets were building and arming offensive missile sites in Cuba. Roger Hillsman in The Cuban Missile Crisis, states that "determining the Soviet motive was crucial. If the Soviets intended to use the missiles to launch a surprise attack, the United States had no choice but to use force to remove them immediately."<sup>13</sup> Hillsman also implies that "if the principal Soviet objective in putting missiles into Cuba was strategic in the broadest political sense, so was the American objective in getting them out."<sup>14</sup> Based on the nature of the missiles, the close proximity of Cuba to the

United States, and the open hostility of the Cold War, the United States would have been justified in utilizing a preemptive surgical air strike to remove the missiles. The air strikes would also have been seen as a proportional use of force.

One reason the air strikes were not used is the precedence that would have been established. Other nations might have used this to rationalize their own aggressive acts against others as a legitimate act of preemption. Another reason to not going forward with air strikes was that the Air Force could not assure total destruction of all the sites. If even one site remained operational the country would strike. Additionally, it was also feared that the air strikes on Cuba might ignite nuclear exchange between the Soviet Union and the United States. With these possible considerations clearly in mind, diplomatic means, bolstered by a show of force, were used to defuse the crisis.

#### 1967 ARAB-ISRAELI WAR

The 1967 Six Day War is an example of a justified use of preemption. During the three week period prior to June 5, 1967 Israeli attack, the Soviet Union and Syria were spreading reports, which were proven false by a United Nations Supervisory Organization, that Israel was preparing for a mid-May attack across the Syrian border. Reports of up to eighteen Israeli brigades along the border were erroneous.<sup>15</sup> In spite of the United Nations proof of the false reports, Egypt mobilized and moved seven divisions, including nine-hundred tanks, to the Sinai and also forward deployed MIG fighters. Egypt also began to initiate pacts with Jordan and Iraq to lend military support. As all of this unfolded, Israel approached the United Nations as well as other global powers seeking help in reducing the imminent Egyptian threat on the Sinai border. By the 5<sup>th</sup> of June it became evident that no outside help would be forthcoming. Israel then preemptively attacked and defeated Egypt and its Arab allies, and with the victory, occupied the West Bank, Gaza Strip, and the Sinai Peninsula. Neither the United Nations General Assembly nor the Security Council condemned the action. Clearly, Israel's use of the preemptive strike was legitimate and necessary to protect and preserve its existence.

#### OSIRAK NUCLEAR FACILITY RAID

The last example involves the state of Israel and its June 1981 bombing of the Iraqi nuclear reactor under construction at Osirak. Israel's argument was that the reactor was being built to produce nuclear weapons and, as such, the raid was merely self-defense. In this example one state felt justified in taking preemptive action even when the general consensus among other nations was that threat was illegitimate. In fact it appears to be a preventative rather than a preemptive attack. Israel felt that the reactor was a bomb factory and that the site

was larger than what would be required for Iraq's energy needs. Iraq had never restrained its rhetoric or posturing in regards to its hatred of Israel. Israel felt that it needed to act before the reactor went on line, for if they were to wait to destroy it unit after it had gone on line, the end result would have been a radioactive disaster.

Negotiations through the United Nations to stop Iraq's nuclear program had not been successful. International law would require Israel delaying any type of action until the risk was imminent. Israel could not wait for that to occur as it would be unable to then deter the nuclear threat from Iraq. Israel felt that it was being the target of an imminent threat that required military action of the preemptive type. Israel consequently, launched the attack, violating both Jordanian and Saudi Arabian airspace while conducting a successful raid that destroyed the facility.

The United Nations Security Council passed a resolution condemning the raid. Timothy McCormick in Self Defense in International Law: The Israeli Raid on the Iraq Nuclear Reactor, states, "most of the arguments against Israel's claim to self-defense focused on the requirement of the necessity for self-defense and in particular on the proximity of the threat."<sup>16</sup> The justification for preemption cannot be made as there was no immediate or imminent threat. Israel was unable to prove the existence of this immediate threat to its survival as the plant was not operational. The raid appeared to the international community as more of an attack on Iraq's increasing strategic influence. As such the attack was considered as more preventative than preemptive.

## **INVASION OF IRAQ**

The most recent example of preemption is the invasion of Iraq by the United States in March 2003. The validity of the preemptive war initiated by the Bush administration has been challenged by many nations. For months prior to the initiation of hostilities, the Bush administration strove, through diplomatic means, to enforce compliance of the United Nations imposed sanctions upon Iraq. President Bush tried to develop a multinational coalition to go against Saddam Hussein and his regime. President Bush stressed the United Nations Security Council resolutions, on-going humanitarian issues within Iraq as well as Saddam Hussein's suspected ties to terrorists. The Bush administration also argued that by overthrowing Saddam Hussein and his regime, a change in the overall political picture of the Middle East would follow that would be more favorable to the United States.

President Bush, during the June 2 002 commencement speech at West Point, stated that, "The war on terror will not be won on the defensive. We must take the battle to the enemy,

disrupt his plans and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act.”<sup>17</sup> In order to help justify the legality of a preemptive war, President Bush and his administration maintained that Saddam Hussein had a program to develop WMD. Saddam Hussein was well known for impeding United Nations inspectors from completing their task. The Bush administration noted Saddam Hussein's use of poison gas both during the Iran-Iraq war as well as against his own citizens. This precedence, along with Saddam Hussein's hatred of the United States, lead to the assumption that he would use WMD against the United States, if not by himself, if given a chance, then through proxies.

These considerations, unfortunately, fall short of proving what is generally accepted as being needed to give credence to the use of preemption against Iraq. The issues raised against Iraq do not appear on face value to make an adequate case for an imminent threat or attack against the United States. An alternative argument to warrant a preemptive attack could be that the overthrow of the current regime in Iraq would send a message to other nations that the United States is serious in its convictions and its prosecution of the war on terrorism. Such a statement might prevent some nations from providing sanctuary to terrorists. If this is the basis of the preventative war against Iraq, along with the opinion that Saddam Hussein is a destabilizing influence in the region and also combined with his hostile intentions towards the United States, then to remove him from power by force might resolve the problem. With the failure of the diplomatic efforts to displace him, in addition to his defeat during the first Gulf War and the hoped for but not existent internal uprising to replace him, it would appear that preemptive action was the only method remaining.

Ivo Daalder, in “The Preemptive-War Doctrine has Met an Early Death in Iraq,” claims that the Bush administration, in order to justify the preemptive attack, relied upon two premises. Daalder identifies the first as being that the intelligence available to the administration and our military was reliable and complete in regards to the intentions and capabilities of Saddam Hussein's regime. Even though he had maintained a closed society, it was felt that the intelligence capabilities of the United States would pry it open.<sup>18</sup> Daalder goes on to identify the other premise as being the willingness of President Bush to go to war due to the great technological advantage of the United States over Iraq. It was felt that this would make the cost of the war acceptable.<sup>19</sup> Unfortunately, the fundamental warrant for the war has not been proven out, for as of October 2004, no WMD had been uncovered. This turn of events led the Bush administration to cease using the rumored WMD as a justification for preemptive war.

President Bush also used the possibility of a tie between the regime of Saddam Hussein and al-Qaeda as additional rationale for going to war, by alluding to al-Qaeda as a proxy for Saddam Hussein. During a March 6, 2003 news conference, President Bush went so far as to link the war against Iraq to the September 2001 attacks. The President said "Saddam is a threat. And we're not going to wait until he does attack."<sup>20</sup> He further stated, "Saddam Hussein and his weapons of mass destruction are a direct threat to this country."<sup>21</sup> President Bush went on by stating, "if the world fails to confront the threat posed by the Iraqi regime...free nations would assume immense and unacceptable risks. The attacks of September 11, 2001 showed what enemies of America did with four airplanes. We will not wait to see what...terrorist states could do with weapons of mass destruction."<sup>22</sup> Later in the news conference the President stated that "Saddam Hussein is a threat to our nation. September 11<sup>th</sup> changed the...the strategic thinking, at least as far as I was concerned, for how to protect the country...used to be that we could think that you could contain a person like Saddam Hussein, that oceans would protect us from his type of terror. September the 11<sup>th</sup> should say to the American people that we're now a battlefield, that weapons of mass destruction in the hands of a terrorist organization could be deployed here at home."<sup>23</sup>

It would now appear, however, that the "imminent" threat posed by Iraq was not as great as originally thought. The intelligence picture, not only provided by our own sources but that of other allied nations, that established a good deal of the impetus for the war was based upon what now appears to have been flawed or in accurate or in error. David A. Kay, a former CIA weapons inspector, when asked about the intelligence on Iraq's stockpiles of chemical and biological agents states, "It turns out we were almost all wrong."<sup>24</sup> It must be stated in defense of the intelligence community, however, that events as recent as the disappearance of over 380 tons of high explosives during the later half of October 2004, shows that chemical or biological weapons could have been hidden. This failure of the intelligence of both the United States and her allies had critical impact. It has led to an undermining of the Bush administration's policy of preemption. In short the critical lack of good intelligence makes it difficult to verify threats as being real or imminent. Intelligence breakdown is compounded by the suspicion that Pentagon and White House policy makers slanted the information in order to lend justification to the attack on Iraq.<sup>25</sup> Sebastian Mallaby, writing in the Washington Post says, "In a technocratic sense, the war was right: Saddam Hussein was an America-hating monster. But the war, unfortunately, enjoys little legitimacy."<sup>26</sup> Mallaby continues, "There is a sense that the Iraq war violated the principles America is admired for. This country stands for the rule of law but the Bush policy of unilateral preemption appears lawless."<sup>27</sup> Saddam Hussein's hatred of America, while onerous

to us, may not legitimize our going to war. This perceived lack of legitimacy would put the legal standing for the preemptive war waged by the United States on somewhat “thin ice”.

## **STRATEGIC IMPLICATIONS**

Several strategic factors that need to be examined and the impact of those factors considered. One factor is precedence. During the Cuban Missile Crisis, President Kennedy considered the consequence of a preemptive attack on Cuba. He felt the United States was justified in a preemptive strike, and if the Russians had crossed the blockade line, there is little doubt that Kennedy would have ordered military action. It seems likely, however, that the use of a preemptive strike could have given other states the justification to follow suit had they felt threatened or perceived a threat. Also when contemplating a policy of preemptive self-defense, it needs to be understood that a clearly defined trigger for the use of preemption may not exist. It also needs to be understood that not all the operational intelligence needed to determine that a threat is immediate and credible may be available when the decision is made to launch an attack.

A state using preemptive self-defense must be prepared to be criticized and judged on the morality of its actions. It must take into consideration the effect preemptive attacks have upon neutral states, allies, and its own citizens. This in itself becomes a strategic factor, as the nation with a preemptive policy can be seen as arrogant and self-centered. If the world community sees the use of preemption by the United States as an excuse for aggression it could question and resist the foreign policy goals of the United States.

Another unintended result could be addressed towards a State's status and character. A preemptive policy could generate significant anti-state sentiment. When the United States, as the only super power, uses preemptive force, it could come across as bullying. The United States recent policy statements about preemption have caused the nation to be described negatively across the globe. The growing perception that the United States is bullying other nations and using preemption in its foreign policy has given rise to increased resentment and this attitude could cause additional attacks against the United States.

States must have an appreciation of the second and third order consequences of their actions when using or advocating a preemptive self-defense policy. Also, the precedence established by its usage may be counter to both national interests and security if its actions give other states the encouragement to justify their actions as preemptive or anticipatory self-defense.



In the world of international politics and relations, rules, understanding about what are or are not legitimate, and the norms that the international community generally recognizes are as important now as ever. Statesmen and diplomats use rules and understanding to govern their actions and their expectations. They are increasingly important in the arena of public opinion as well as with the globalization of the world. They are also at the forefront of importance with the increased democratization of the world, as they form a central core of essential values in dealings between states. The future of these rules and standards are also dependant upon the respect and consideration they are given by the major powers and how they are used by those powers. It is the actions of the global powers and hegemons that both give and remove legitimacy to the norms.

Will the actions taken by the United States under the Bush Administration both verbally and militarily against Iraq be a signal for other nations to also react preemptively? By going to war, even though there was no imminent threat, or that the perceived threat could not be contained through continued diplomatic means, has it sent that signal? By claiming that the leader of a regime is evil and is attempting to procure dangerous WMD, and at some point in the future may use those weapons, does that justify the preemptive use of military force? Do those claims negate any type of international debate, or might result of that debate cause the state to preemptively remove a troublesome regime from power? The example set by the United States attack on Iraq could establish the precedent for others. Could this be the catalyst needed that allows any of a number of states to justify or ratify their desire to preemptively remove what it perceives to be a hostile regime. North Korea and South Korea, China and Taiwan, or Israel and Syria are a few that come to mind.

The legitimacy of any preemptive action must be given strong consideration. It is incumbent upon the administration to look at past actions as it lays out policy out. Its ability to justify any action will allow it to be judged as morally correct. It must also be remembered that no matter how justifiable the action, some nations will not see it that way.

After the September 2001 attacks on the United States, European defense policies went through the same sort of dramatic change as those of the United States. In early 2002, Therese Delpech, an observer of French security and foreign policies stated "France would not accept the proposition that it has adversaries".<sup>28</sup> Delpech says that Europe's tendency to downplay possible threats emanates from the memories of a historical military dependence on the United States, the memory of past wars, and weak strategic intelligence capabilities. However, as the full extent of the 9/11 attacks registered, the tone in Paris changed dramatically. The French minister of defense, Michele Alliot-Mare, during a speech in November 2002, before the French

National Assembly said “a decade after the end of the Cold War, we expected a new world order that would bring stability and peace. Contrary to our hopes, threats to peace have accumulated. Regional crises have multiplied. The development of ballistic missiles and weapons of mass destruction continues; North Korea is the latest example...With the terrorist attacks in the United States on September 11 and in Karachi and Bali, large scale terrorism has become a reality. It threatens directly the lives of our citizens and our national interests.”<sup>29</sup>

The outlook of the German defense establishment is equally pessimistic. Peter Struck, the German Minister of Defense in a speech in February 2003 addressed the security situation and the impact the September 2001 terrorist attacks. He said, “More and more states and non-state actors are seeking to procure weapons of mass destruction and ballistic delivery systems and thus are undermining both regional and global security. Chemical, biological, radiological, or even nuclear weapons in the hands of terrorists are one of the greatest threats of our times. Against this backdrop, the mission spectrum of the Bundeswehr has changed fundamentally over the past few years.”<sup>30</sup>

However supportive the French and Germans might sound, when action came, England, Spain, and Poland were supportive. The British have stood alongside the United States consistently, both diplomatically and militarily. Britain's position has been clear and without hesitation. Spain's support, it would appear, ended in response to the terrorist bombings in Madrid and a change in political leadership.

The rest of Europe comes to view the Bush administration's National Security Strategy as a broad attack on global rules. It has responded to the United States preemptive war on Iraq with exception based on international law. The Bush administration's emphasis on the projection of military power through the use of preemption goes against the European orientation of a more strict interpretation of international law. If the European disagreement with the Bush administration's policy of preemption continues to grow, associated rhetoric will have an unfortunate result. It could cause Washington to drift even farther away from working to develop multi-lateral coalitions and an adherence to international law. Endy Zemenides, however, in an article published in The Officer states that, “Preemptive self-defense has always had, and will always have, a place in the foreign policy toolbox of U.S. presidents. The challenge for the international community is to reconsider the established customary international law criteria for preemptive self-defense. The new dimension to consider is the threat of terrorism and WMD.”<sup>31</sup>

This would present Europe with another option. That would entail working with Washington to revise the law of war based on the changing nature of national security threats.

This would, of course, meet with opposition as any constraints that revisions would place upon the United States' ability to act preemptively or in the mode of anticipatory self-defense would not be considered. The approach would, however, display the importance of international law as a primary concern of international diplomacy.

Europe should take the long range approach and work with those within Washington who believe in a strong multilateral outlook to revise the international law of war. To close ranks and create a strong anti-American bloc as European states have been doing these past many months, is a mistake. Revising the law of war to address current security issues would help make the case for multi-lateralists within the United States easier to sell. Europe needs to develop its own security strategy prior to engaging the Bush administration. If the European Union members had a serious regional security strategy it would give them a stronger position from which to work as well as the credibility needed to negotiate.

The recent debate leading up to the war in Iraq brought forth most of the arguments for the past decade. The essential points concern WMD, Iraq's possible sheltering of non-state terrorists, and the removal of Saddam Hussein and his regime. Even though the European community was divided on the use of military force they strongly agree that the use of that force should meet a strict standard of legitimacy. They felt that a military action against Iraq must not threaten the international system of laws that has been in existence for more than a century.

Technological advances, however, have changed the nature of the threat and in turn the definition of self-defense. The Bush administration's 2002 National Security Strategy justifies the use of preemptive war on the grounds that it is the appropriate defense against the threat of WMD. As discussed previously, it is generally accepted, in theory and practice, that states do not have to wait to be attacked before responding if there is evidence of an enemy's preparation to attack. But what evidence is required? In an age when rogue states possess ballistic missiles and WMD what should constitute the new level of proof? The real problem is that in today's international security climate there may not be a firm answer. However, without genuine reform of the international law incorporating a more liberal view of a state's ability or right to preemptively defend itself against terrorism and WMD, the law itself could be relegated to irrelevancy.

## **CONCLUSION**

The National Security Strategy of the United States of America specifies that "...as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best.

We must be prepared to defeat our enemies' plans using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action."<sup>32</sup> With the advent of modern technology we no longer have the total security from a conventional attack that we have so long enjoyed. The oceans that in the past had given us the time we needed to recognize and prepare to meet a threat have been offset by that technology. This was brought home in dramatic fashion by the terrorist attacks against this country in September of 2001. With growing accessibility to WMD and their ease of deployment, rogue states and terrorists now pose threats that international law was never designed to address. In "Preemptive War and International Law", Steven Welsh says that, "With respect to preemption, the National Security Strategy issued by U.S. President George W. Bush itself does not necessarily significantly challenge prevailing international law. It rests upon a standard doctrine of anticipatory self-defense, and explores the question of when an attack is imminent. On its face it does not seek to overturn the rule, but to explore how the rule and its underlying purpose could be applied in particular situations not existing in the past."<sup>33</sup>

The National Security Strategy looks at several areas. The first area to be considered is the difficulty in detecting an imminent terrorist attack. Another is that terrorists typically target civilians. The other area is WMD and their potential to inflict catastrophic casualties. The parts of the National Security Strategy that mention preemption, while not limiting itself to the use of WMD, is located in the section that deals with those very weapons.

One might suggest that with the proliferation of WMD changes need to be made to international law and how it applies to preemption and a nation's right to self-defense. Due to the lethality of the weapons and methods of employment, defensive attacks could be legitimized, especially if tied to other variables such as terrorists or other pending acts of aggression.

Whereas elevating a policy of preemption to a national foreign policy statement helps reassure citizens that the government is being proactive in regards to its defense and security, we have seen that there are inherent problems in this as well. Articulating and providing evidence that a threat is imminent and viable is crucial to the taking of action while at the same time deflecting any negative consequences from both within the country as well as the global community. As a hegemon, the United States needs to be cautious in its use of preemptive justification for an attack as it could lead to a proliferation of other states using preemption as a convenient tool for advancing their foreign policy.

It appears that the Bush administration's policy of preemptive war has exceeded the norm for that of anticipatory self-defense. To base, in part, the decision to go to war on the chance that Saddam Hussein may transfer WMD to rogue groups, the United States needs to provide the evidence needed to justify the claim in order to legitimize the right to anticipatory self-defense. Preemption should be restricted to those rare situations where all other elements of national power have been tried or hold no hope of being successful. Preemptive force should be used only as a necessity and in justifiable proportion to the threat. The ends achieved by a preemptive strategy will not, on its own, solve the war on terror, but will help achieve the desired ends. Nothings can guarantee perfect security. There is no perfect system against terrorists or WMD and it would be foolish to think that there is. One step in the overall battle, though, could entail a more proactive program that includes increased intelligence gathering and analysis not only in the United States, but in conjunction with our allies as well. Combine this with clandestine strikes and operations to strike terrorists with "terror" as well, for it is just as easy for the terror monger to be a rogue group as a rogue state.

In the case of the other two members of President Bush's "axis of evil", North Korea probably has nuclear weapons and Iran is clearly pursuing a nuclear weapons program. The threat to regional and global stability is much greater today than that posed by Iraq of yesterday. Both of their militaries present a greater challenge to the United States. Iran has not only a much larger population than Iraq, but has a more stable domestic situation as well. North Korea all but holds the South Korean capital hostage based on the proximity of the capital to their shared border. What will the United States position "preemptively" be toward these two states? The administration should look upon the use of preemptive force if the criteria of imminent threat are evident, or if not evident, then with the approval of the United Nations Security Council. President Bush needs to state clearly what the policies of the United States are. Our allies' concerns over these policies may reflect more a need to understand them and our preemptive plans than an outright condemnation of them. The leadership of the United States, as the world's only superpower, is crucial to global stability. If not managed properly the strategy of preemption has potential consequences that can far outweigh any long term benefits.

WORD COUNT= 6,510

## ENDNOTES

<sup>1</sup> Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 2nd ed. (New York: Basic Books, 1992), xii-xiii.

<sup>2</sup> Richard K. Betts, *Surprise Attack* (Washington D.C.: The Brookings Institute, 1982), 145.

<sup>3</sup> Ibid., 146.

<sup>4</sup> Ibid.

<sup>5</sup> Walzer, 81.

<sup>6</sup> Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly* (Spring 2003): 90.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., 91.

<sup>10</sup> Ibid., 93.

<sup>11</sup> United Nations Security Council, "Security Council Resolution 1373," 28 September 2001; available from <<http://www.un.org/docs/sc/committees/1373/res1373e.pdf>>; Internet; accessed 05 October 2004.

<sup>12</sup> George W. Bush, "Commencement Address to the United States Military Academy Class of 2002," 1 June 2002; available from <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>; Internet; accessed 10 October 2004.

<sup>13</sup> Roger Hillsman, *The Cuban Missile Crises* (Westport, CT.: Praeger Publishers, 1996), 79.

<sup>14</sup> Ibid., 96.

<sup>15</sup> Richard B. Parker, ed., *The Six Day War* (Gainesville, FL: University Press of Florida, 1996), 6.

<sup>16</sup> Timothy L. H. McCormick, *Self-Defense in International Law: The Israeli Raid on the Iraq Nuclear Reactor* (New York, NY: St. Martins Press, 1996), 292.

<sup>17</sup> Bush.

<sup>18</sup> Ivo Daalder, "The Preemptive-War Doctrine Has Met an Early Death in Iraq," *The Los Angeles Times* 30 May 2004; available from <<http://www.brook.edu/views/op-ed/daalder/20040530.htm>>; Internet; accessed 05 October 2004.

<sup>19</sup> Ibid.

<sup>20</sup> George W. Bush, News Conference of March 6, 2003 Transcript, *Washington Post*, 7 March 2003, sec. A, p. 1.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> "Rethinking Preemptive War," *Business Week Online* 3870 (16 February 2004): 104 [database on-line]; available from Proquest; accessed 28 September 2004.

<sup>25</sup> Ibid.

<sup>26</sup> Sebastian Mallaby, "Legitimacy's Legacy," *The Washington Post* (12 April 2004): A19 [database on-line]; available from Proquest; accessed 2 October 2004.

<sup>27</sup> Ibid.

<sup>28</sup> Therese Delpech, "A Safe and Secure Europe?," In *Assessing the Threats*, ed. John Newhouse (Washington D.C.: Center for Defense Information, July 2002), 12.

<sup>29</sup> Michele Alliot-Mare, "Speech Before the French National Assembly," 28 November 2002; available from <<http://www.defense.gouv.fr>>; Internet; accessed 5 October 2004.

<sup>30</sup> Peter Struck, "Speech to the Munich Security Policy Conference on the Future of NATO," 8 February 2003; available from <<http://www.bmvg.de>>; Internet; accessed 5 October 2004.

<sup>31</sup> Endy Zemenides, "The Doctrine of Preemption: Precedents and Problems," *The Officer* 80 (April 2004): 31 [database on-line]; available from Proquest; accessed 16 September 2004.

<sup>32</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington D.C.: The White House, September 2002), ii.

<sup>33</sup> Steven C. Welsh, "Preemptive War and International Law," 5 December 2003; available from <<http://www.cdl.org/news/preemptive-war.cfm>>; Internet; accessed 5 October 2004.

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